APPENDICES

The following appendices contain the constitutional and statutory provisions involved in this case (App. I) and a discussion of child pornography (App. II). References in the brief to lettered appendices A, B and C are to the appendices to the petition for a writ of certiorari.

APPENDIX I

Constitutional and Statutory Provisions Involved

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law . . . .

The relevant sections of Article 263 of the New York Penal Law provide:

> §263.00 *Definitions*
>
> As used in this article the following definitions shall apply:
>
> 1. "Sexual performance" means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.
>
> 2. "Obscene sexual performance" means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.
>
> 3. "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.
>
> 4. "Performance" means any play, motion picture, photograph or dance. Performance also means any

other visual representation exhibited before an audience.

5. "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

6. "Simulated" means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks.

7. "Deviate sexual intercourse" means the conduct defined by subdivision two of section 130.00 of this chapter.

8. "Sado-masochistic abuse" means the conduct defined in subdivision five of section 235.20 of this chapter.

§263.05 *Use of a child in a sexual performance*

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

Use of a child in a sexual performance is a class C felony.

§263.10 *Promoting an obscene sexual performance by a child*

A person is guilty of promoting an obscene sexual performance by a child when, knowing the character

and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age.

Promoting an obscene sexual performance by a child is a class D felony.

§263.15 *Promoting a sexual performance by a child*

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

Promoting a sexual performance by a child is a class D felony.

APPENDIX II

The sexual abuse of children in the production of films, photographs and live performances is a major problem of national significance. The nature and extent of such abuse was delineated in the congressional hearings held from May to September 1977, before enactment of the federal child pornography statute, 18 U.S.C. §§2251 *et seq.*[1] The subject was considered in other legislative forums and investigative reports dating from the same period,[2] and was extensively illuminated in the news media also beginning in 1977.[3] The problem has been treated in several

1. *See* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children I); Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) (hereinafter cited as Protection of Children Against Sexual Exploitation); Sexual Exploitation of Children, Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children II).

2. *See* Obscenity and the Use of Minors in Pornographic Material, Hearings Before the California Assembly Committee on Criminal Justice (1977); Attorney General's Advisory Committee on Obscenity and Pornography, Report to the Attorney General on Child Pornography in California (1977); Sexual Exploitation of Children, A Report to the Illinois General Assembly by the Illinois Legislative Investigating Commission (1977) (hereinafter cited as Sexual Exploitation of Children [Illinois]); Interim Report of Texas House Select Committee on Child Pornography: Its Related Causes and Control (1978).

3. *See, e.g.*, Sneed, Bliss, Moseley, *et al., Child Pornography: Sickness for Sale*, series of articles in *Chicago Tribune*, May 15-17, 1977, *reprinted in* Sexual Exploitation of Children I, *supra* note 1 at 428-42 *and in* Protection of Children Against Sexual Exploitation, *supra* note 1 at 130-50; Clifford, series of articles on child prostitu-

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books written for a general audience,[4] and it has begun to receive scientific attention as well.[5]

The evidence reported in these sources establishes two propositions convincingly. First, by the middle seventies, the use of children engaged in sexual conduct in the production of films, photographs and live performances had become a major reality, in New York and elsewhere in the United States. Second, this use of children is a form of sexual abuse and is seriously harmful to the children involved.

A

In 1977 it was estimated that commercial child pornography accounted for five to ten percent of sales in the por-

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tion and pornography, *The Jackson (Mississippi) Daily News*, August 24-28, 1980; *Kiddie Porn*, 60 Minutes, vol. IX, No. 33, May 15, 1977, *reprinted in* Protection of Children Against Sexual Exploitation, *supra* note 1 at 123-30; *Child Pornography: Outrage Starts to Stir Some Action*, U.S. News and World Report, June 13, 1977, p. 66; *Child's Garden of Perversity*, Time, April 4, 1977, p. 55, *reprinted in* Sexual Exploitation of Children I, *supra* note 1 at 423; Ditkoff, *Child Pornography*, American Humane, April 1978, pp. 29-32; Anson, *The Last Porno Show*, 8 New Times 46 (1977), *reprinted in* Protection of Children Against Sexual Exploitation, *supra* note 1 at 150-58; Dudar, *America Discovers Child Pornography*, Ms., August 1977, p. 45. *See also* Baker, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 Pepperdine L. Rev. 809 (1978).

4. R. Lloyd, For Money or Love: Boy Prostitution in America, pp. 79-101 (1976); R. Geiser, Hidden Victims: The Sexual Abuse of Children, pp. 109-22 (1979); F. Rush, The Best Kept Secret: Sexual Abuse of Children, pp. 158-69 (1980); C. Linedecker, Children in Chains, *passim* (1981).

5. *See* Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980); Guio, Burgess and Kelly, *Child Victimization: Pornography and Prostitution*, 3 J. of Crime and Justice 65 (1980); Burgess, Groth and McCausland, *Child Sex Initiation Rings*, 51 Am. J. Orthopsych. 110 (1981).

nography industry as a whole.[6] It is impossible to estimate with certainty the size of the pornography industry, but according to one estimate prepared by the California Department of Justice, the industry as a whole generates revenues of $4 billion per year.[7] Even assuming that sales of child pornography comprise a modest five per cent of that total, child pornography produces $200,000,000 annually; in financial terms, clearly, it is a sizeable business.

Before the enactment of Article 263 of the New York Penal Law, child pornography was sold openly in New York. For example, in January 1977 magazines entitled "Lollitots," "Nudist Moppets," "Brat," and "Tots," which showed children from three to sixteen in lewd and suggestive poses, were available in bookstores in Times Square. Also sold in Times Square were films showing children involved in sexual acts. For example, in one film, the well-known "First Communion," a gang of bikers invade a church, crucify the priest and then rape five young girls on the morning of their first communion. Another film sold at the same time depicts an eight year old boy and a ten year old girl engaged in sexual conduct.[8] An

6. Sexual Exploitation of Children I, *supra* note 1 at 10 (statement of Frank Osanka, Professor of Social Justice and Sociology and specialist in child abuse and neglect), 61 (statement of Investigator Lloyd H. Martin, Sexually Exploited Child Unit, Los Angeles Police Department); *see* Dudar, *supra* note 3 at 46.

7. Cook, *The X-Rated Economy*, 122 Forbes 81 (1978).

8. Sexual Exploitation of Children I, *supra* note 1 at 40-44; Sexual Exploitation of Children II, *supra* note 1 at 263-65 (statements of Judianne Densen-Gerber, J.D., M.D., President, Odyssey Institute). *See* Campbell, *Help Sought for Children Used in Pornography, New York Times*, Jan. 14, 1977, Pt. II, p.3, col. 1; Anson, *supra* note 3 at 150-51; Linedecker, *supra* note 4 at 31. The contents of "First Communion" are described in testimony

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undercover police officer who operated an "adult" bookstore in the Times Square area found child pornography more profitable than materials showing adults. According to the officer, "You pay, say, $3 for a film, you sell the same film for $20. Eight millimeter, 10- or 15-minute things. For children, you'd pay more, maybe $7, then you sell for $25.'"[9] There are also accounts of girls and boys as young as thirteen dancing in live strip shows and "peep-shows" in Manhattan.[10]

The extent of the traffic in New York in materials which show children engaged in sex can be judged by the amounts of materials seized in arrests of New York pornographers. In April 1977, two raids in Manhattan produced 4,000 copies of "peep-show" films showing children from eight to twelve years old.[11] In another raid in Nassau County, the police confiscated 4,000 photographs of girls aged eight to fourteen engaged in sexual conduct with adults, sometimes their own fathers, including intercourse and oral sex. The photographer marketed the pictures through adver-

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before the Subcommittee to Investigate Juvenile Delinquency. Protection of Children Against Sexual Exploitation, *supra* note 1 at 67 (statement of Frank Osanka). The contents of seven other films were also described, showing children engaged in acts of rape, intercourse, masturbation, oral copulation, anal-genital contact and urolagnia, with other children and with adults. According to Dr. Osanka, the theme of sado-masochism prevails in many of the films and magazines he described for the Subcommittee. *Id.* The theme of bestiality is also to be found. For example, in New Orleans, police arresting three Boy Scout leaders involved in a boy prostitution and pornography ring discovered boxes of photographs of men and boys engaging in sex with animals. Linedecker, *supra* note 4 at 75-76.

9. Cook, *supra* note 7 at 88.

10. T. Abel-Petersen, Children of the Evening, pp. 97-101 (1981); Sexual Exploitation of Children II, *supra* note 1 at 251 (statement of Bruce Ritter).

11. Ivins, *Eight Held as Principals in Smut Production, New York Times*, April 27, 1977, p.1 col. 6.

tisements in Screw magazine; along with the photographs, the police discovered mailing lists containing thousands of names, primarily from New York, Connecticut, New Jersey, Pennsylvania and Florida. In all, some twenty-five girls were involved in this "cottage industry" mail-order child pornography ring.[12]

Pornographic magazines, photographs and films involving children are not peculiar to New York. In his research on boy prostitution and pornography, Lloyd found no fewer than 264 different magazines showing children involved in sex,[13] and large-scale distributors or would-be distributors of pornographic films and photographs have been identified in such towns and cities as Port Huron, Michigan, Winchester, Tennessee, Santa Clara, California, Houston, Chicago and New Orleans.[14]

In sum, the nationwide child pornography industry produces and disseminates materials devoted to showing children engaged in every kind of sexual act imaginable. As

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12. Linedecker, *supra* note 4 at 13-17; *see People* v. *Byrnes*, 33 N.Y. 2d 343, 352 N.Y.S. 2d 913, 308 N.E. 2d 435 (1974).

13. Sexual Exploitation of Children I, *supra* note 1 at 333; Sexual Exploitation of Children II, *supra* note 1 at 113.

14. Linedecker, *supra* note 4 at 37-60, 74-80; Lloyd, *supra* note 4 at 85-89; Protection of Children against Sexual Exploitation, *supra* note 1 at 35-42 (statement of Gerald A. Richards, pornographer); Sexual Exploitation of Children I, *supra* note 1 at 75-76, 94-95 (statement of Robert F. Leonard, District Attorney, Genesee County, Michigan), 82-88 (articles by Wright, *et al.* in *Traverse City Record-Eagle*), 435-40 (Sneed, Bliss and Moseley, articles in *Chicago Tribune*), 442-43 (Loggins and Branscome, *Boys Farm Scandal: People in Rural Tennessee County 'Just Didn't Know' What Went On, Washington Post*, June 5, 1977); Sexual Exploitation of Children II, *supra* note 1 at 112 (statement of Robin Lloyd); Sexual Exploitation of Children (Illinois), *supra* note 2 at 129, 165-71, 175-77; Interim Report of Texas House Select Committee on Child Pornography: Its Related Causes and Control, *supra* note 2 at 62-63, 69-72, 76-77.

we will now see, the inevitable and tragic byproduct of this production and dissemination is profound physical and, especially, psychological damage to the children victimized by the industry.

B

Adults who make children engage in sex before cameras or audiences commit a form of sexual abuse which is seriously damaging to the child. The most obvious danger, particularly where the child engages in sexual activity with an adult, is the possibility of physical injury or infection resulting from the act itself.[15] But the psychological consequences of such activity may be even more deleterious; although physical injury or disease can heal or be cured medically, the emotional trauma "may and usually does result in prolonged or permanent damage to the individual."[16] The child, merely by reason of immaturity, cannot intelligently consent to sexual activity involving an adult.[17] Beyond mere inability to consent, in many cases the child may actually be coerced into participating by pa-

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15. Blumberg, *Child Sexual Abuse: Ultimate in Maltreatment Syndrome*, 78 New York State Journal of Medicine 612-16 (1978); *see* Sgroi, *Comprehensive Examination for Child Sexual Assault: Diagnostic, Therapeutic and Child Protection Issues, reprinted in* Burgess, Groth, Holmstrom and Sgroi, Sexual Assault of Children and Adolescents, pp. 143-57 (1978).

16. Blumberg, *supra* note 15 at 614.

17. Sexual Exploitation of Children I, *supra* note 1 at 5 (statement of Frank Osanka). *See* Finkelhor, *What's Wrong with Sex Between Adults and Children?* 49 Am. J. Orthopsych. 692, 694-95 (1974); Burgess and Holmstrom, *Sexual Trauma of Children and Adolescents: Pressure, Sex and Secrecy, reprinted in* L. Schultz, The Sexual Victimology of Youth, pp. 67-71 (1980).

rental command, physical abuse or blackmail.[18] Such nonconsensual sexual activity disrupts the child's natural sexual development and can have a devastating effect on the child's personality and relationships with others.[19] The harm is clear from the symptoms observed in children prematurely sexualized by adults. They develop symptoms such as headaches, loss of appetite, enuresis, loss of sleep and nightmares, and social symptoms such as poor performance in school, withdrawal from normal social life and sexual delinquency.[20] Of course, where the sex act is forcible, the trauma is all the more severe.[21]

One abundant source of models for the child pornographer is runaways, who often turn to posing for pornographic photographs and films in order to survive.[22] For the child who sells his or her body out of economic need, the psychological results can be devastating. Sex is removed from the context of affection and transformed into

18. *See* Guio, Burgess and Kelly, *supra* note 5 at 68, and other sources cited in Appendix C (pp. 8a-10a) of the brief *amicus curiae* submitted by Covenant House in support of the petition for certiorari; *see also* Anson, *supra* note 3 at 152; Linedecker, *supra* note 4 at 14-15.

19. Blumberg, *supra* note 15 at 614; Sexual Exploitation of Children I, *supra* note 1 at 9 (statement of Frank Osanka), 41-43 (statement of Dr. Densen-Gerber); Weeks, *The Sexually Exploited Child*, 69 So. Med. J. 848, 850 (1976); *see also* Gaylin, *The Prickly Problems of Pornography*, 77 Yale L. J. 579, 592-93 (1968).

20. Blumberg, *supra* note 15 at 614; Burgess, Groth and McCausland, *supra* note 5 at 115-16; Burgess and Holmstrom, *supra* note 17 at 72-80.

21. Blumberg, *supra* note 15 at 614; Finkelhor, Sexually Victimized Children, pp. 104-07 (1979).

22. Sexual Exploitation of Children I, *supra* note 1 at 57, 59 (statement of Investigator Martin); Sexual Exploitation of Children II, *supra* note 1 at 249-51 (statement of Bruce Ritter); Abel-Peterson, Children of the Evening, *supra* note 10, *passim*; Koestler, Runaway Teenagers, Public Affairs Pamphlet No. 552, p. 8 (1981).

an impersonal act, the subject of a commercial transaction. The child comes to view himself or herself as an object to be sold.[23] According to Father Bruce Ritter of Covenant House,

> The worst part of it is that children have no understanding of consequences. They haven't developed any kind of insight, while attitudes form very quickly. This means that if you put a kid in the sex industry, he's going to split himself in two. For a while he's going to stay inside one half of his head and decide, "What I am over here is good and that's me, and what I do over there is something else." But gradually the two sides begin to merge, and the attitudes almost invariably follow the activity, not vice versa. We used to think that the kid got into the industry because of bad attitudes and then healed when he stopped, but that's not so—it's pretty much always the other way around. A kid gets into prositution because he has to survive, he has no place to go; and then once he's involved, the attitudes that justify it take shape.[24]

There has been little scientific study of these effects due to the recency of child pornography as a focus of concern. However, the single reported psychiatric case history[25] firmly supports the view that involvement in child por-

23. Herbert Freudenberger, quoted in *Child's Garden of Perversity*, Sexual Exploitation of Children I, *supra* note 1 at 424; *see* Stoller, *Centerfold: An Essay on Excitement*, 36 Arch. Gen. Psych. 1019, 1020, 1023-24 (1979); Burgess, Groth and McCausland, *supra* note 5 at 117-18; D. Bracey, "Baby-Pros": Preliminary Profiles of Juvenile Prostitutes, pp. 51-52 (1979).

24. S. Janus, The Death of Innocence, p. 177 (1981). *See also* T. Abel-Peterson, Children of the Evening, *supra* note 10, *passim*; Anson, *supra* note 3 at 154, 156; Protection of Children Against Sexual Exploitation, *supra* note 1 at 18-21 (statement of "Marty," juvenile prostitute in Chicago).

25. Schoettle, *supra* note 5.

nography is seriously harmful. That case involved a twelve-year-old girl involved in a pornography ring for three and one-half years. Her experience brought no pleasure but only fear of recrimination. Projective testing after the ring was exposed depicted her as helpless and depressed, with a denial or pulling away from sexual concerns. "A child whisked into an adult sexual world," she showed confusion of sexual roles, alternately flaunting a pseudomature sexual competence and shrinking from the prospect of maturation. The psychiatrist's observations of the child caused him to conclude that a child's involvement in pornography causes anxiety. If, as in this case, the degree of anxiety aroused is threatening to the immature ego, the experience can be traumatic. Besides these effects resulting from the sexual abuse itself, the child in this case suffered additional guilt, anxiety and loss of self-esteem while recounting her experiences to the police and the courts and in treatment. When neighbors learned of her involvement in the ring, they harassed her to the point where she threatened suicide.[26]

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26. *Id.* at 293-97. Schoettle suggests that the effects of using children to produce pornography resemble those of incest, *id.* at 296-97, and there is wide agreement that incest can bring about substantially harmful effects, such as guilt, depression, feelings of worthlessness and psychologically induced somatic disorders. *See, e.g.*, Summit and Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 Am. J. Orthpsych. 237 (1978); Lewis and Sarrel, *Some Psychological Aspects of Seduction, Incest and Rape in Childhood*, 8 J. Am. Acad. Child Psych. 606 (1969); D. Finkelhor, *supra* note 21 at 31-32, 97-108, 185-214; R. Kempe and C. Kempe, Child Abuse, pp. 54-56 (1978). In addition to these psychological effects, there is evidence linking incest with specific pathological behaviors such as prostitution, James and Meyerding, *Early Sexual Experience As a Factor in Prostitution*, 7 Archives of Sexual Behavior 31 (1978); Sexual Exploitation of Children II, *supra* note 3 at 135 (statement of Henry Giarretto, Director, Santa Clara County Child Sexual Abuse Treat-

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The harms caused to children who are required to engage in sex in the production of films and photographs are not limited to those caused by the production process itself. Once a child's sexual conduct has been recorded, the film or photograph is available to any purchaser or viewer. The dissemination of such materials seriously invades the child's privacy,[27] and it may cause severe embarrassment as well.[28] In some cases, moreover, child molesters have used photographs of their victims to blackmail them into keeping silent.[29]

In addition, such materials may be dangerous to children other than the child depicted. Law enforcement officers observed that child molesters use pornography, includ-

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ment Program), drug abuse, Benward and Densen-Gerber, *Incest As a Causative Factor in Anti-Social Behavior: An Exploratory Study*, 4 Contemp. Drug Prob. 322 (1975), and abuse of the victim's own children. Summit and Kryso, *supra* at 248. *See generally* K. Meiselman, Incest: A Psychological Study of Causes and Effects with Treatment Recommendations, pp. 194-261 (1978). To the extent that the use of a child in the production of pornography resembles incest, it may be expected to have the same pathological results.

27. *See* brief *amicus curiae* submitted by Covenant House in support of the petition for certiorari, pp. 8-14.

28. Consider the reaction of Brooke Shields to a recent proposal to publish photographs of her which were taken in 1975, when she was ten years old: "I'm embarrassed by those photos. I wasn't embarrassed when they were taken, but since then I've become more conscious of boys, of my body and myself. Now I just want to be myself. Those pictures are not me now." The photographs in question depicted mere nudity, not actual or simulated sexual conduct. *Brooke and Teri*, Us, January 19, 1982, p. 65; *see Matter of Shields* v. *Gross*, —— Misc.2d ——, —— N.Y.S.2d ——, N. Y. Law Journal, November 16, 1981, p. 13 col. 1 (Sup. Ct., N.Y. Co., 1981). *See also* L. Lovelace, *Ordeal*, pp. 1, 261 (1980).

29. Sexual Exploitation of Children 1, *supra* note 1 at 58-59 (statement of Investigator Martin); Linedecker, *supra* note 4 at 38.

ing child pornography, to seduce their young victims.[30] And the danger exists that child pornography, like pornography of any kind, will stimulate its adult users to act out in real life the fanstasies it engenders. A direct causal link between child pornography and child molestation has not so far been scientifically established. Nevertheless, child abusers are avid consumers of child pornography,[31] and it is impossible to rule out the danger that pornography is one factor among the complex of causes which precipitate the abuse, particularly where the pornography is of a violent, sadistic nature and the user is sexually disturbed.[32] In 1973 this Court noted that "there is at least an arguable correlation" between obscenity and crime. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 58 (1973). The case for that proposition is stronger now than it was in 1973,[33] and there is no evidence whatever which suggests that materials which depict children engaged in sexual conduct, whether legally obscene or not, are any less likely to lead to criminal conduct than other pornographic materials.

Ultimately, whether it is possible to show conclusively a correlation between the viewing of child pornography and

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30. Sexual Exploitation of Children I, *supra* note 1 at 58-59 (statement of Investigator Martin); Linedecker, *supra* note 4 at 38.

31. *See, e.g.*, Protection of Children Against Sexual Exploitation, *supra* note 1 at 37-38, 45 (statement of Gerald Richards); Linedecker, *supra* note 4 at 54, 75-76, 214-18.

32. Court, *Pornography and Sex Crimes: A Re-evaluation in Light of Recent Trends Around the World*, 15 International Journal of Criminology and Penology 129, 152-54 (1976); *Sex and Violence: Pornography Hurts*, 118 Science News 166, 172 (1980).

33. *See* Chervenak, *Selected Bibliography on Pornography and Violence*, 40 U. Pitt. L. Rev. 652, 660 (1979) (authorities collected).

the sexual abuse of children is of secondary importance. What is primary and beyond dispute is that the production of child pornography necessarily entails the criminal sexual abuse of the boys and girls who are made to perform. The psychological and physical damage to these children demonstrates conclusively that child pornography is not a victimless crime, but a substantial social evil.